No. 09-1328

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN SMITH, Warden,

PETITIONER,

-vs-

ROBERT S. VASQUEZ,

RESPONDENT.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

There are aspects of Petitioner's Statement of the Case and facts that are misleading as relates to the summarizing of the Sixth Circuit's opinion and the deference applied in reaching that opinion. These facts and omissions will be addressed specifically in this opposition to *certiorari*.

Respondent Robert Vasquez was indicted on August 16, 2000 and convicted in the Cuyahoga County Court of Common Pleas for (1) rape of a minor under the age of thirteen (Ohio Revised Code ("O.R.C.") § 2907.02); and (2) kidnapping with a specification of sexual motivation (O.R.C. § 2905.01). His trial began on October 30, 2000. At trial, Defense Counsel offered no witnesses in Mr. Vasquez's defense. The trial concluded on November 3, 2000 with jury verdicts of guilty as to both counts of the indictment. On December 22, 2000, Respondent was given concurrent sentences of life as to Count One and nine years as to Count Two.

On October 9, 2001, Respondent filed a Post-Conviction Petition to Vacate or Set Aside Judgment of Conviction pursuant to O.R.C. § 2953.21. Thereafter, Respondent and Petitioner filed several memorandums and supplemental memorandums.

On November 14, 2002, the day after the Ohio Court of Appeals ruled on his direct appeal, the trial court denied Respondent's motion for post-conviction relief filed on October 9, 2001. The Ohio Eighth District Court of Appeals affirmed the trial court on January 20, 2004. That decision was appealed to the Ohio Supreme

Court on March 4, 2004. The Ohio Supreme Court denied leave to appeal and dismissed the appeal on June 9, 2004.

Respondent filed a petition for writ of habeas corpus on June 29, 2005. That Petition was granted on October 3, 2007. Pet. App. C-66a. Relying on different grounds, the Sixth Circuit Court of Appeals upheld the District Court's decision on September 2, 2009. Pet. App. B-3a. A request for a rehearing was denied on January 28, 2010. Pet. App. A-1a. Petitioner filed a Petition for a Writ of *Certiorari* to this Court and it is to this Petition that Respondent timely opposes.

INTRODUCTION

1. Question Presented No. 1: Does a state court act "contrary to...clearly established Federal law" under 28 U.S.C. § 2254(d)(1) when it cites the appropriate standard of review for a specific issue in its opinion but later uses imprecise shorthand terms in referring to that standard?

Petitioner's first question presented does not offer a compelling reason for this Court to grant *certiorari*. As stated in the Court's rules, *certiorari* may be granted when a court of appeals issues a decision in conflict with the decision of another United States court of appeals on the same important matter or when a court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Rules of the Supreme Court of the United States, No. 10. While Petitioner attempts to frame the question as fitting in this narrow class of cases, the facts and the Sixth Circuit's ruling demonstrate that it is not that type of case. The Sixth Circuit did not find that an imprecise shorthand is unacceptable even though the proper standard was applied. Instead, the Sixth Circuit determined that the state courts actually applied the incorrect standard. No court of appeals, and certainly not this Court, has ever held that the standard for ineffective assistance of counsel is anything but that which is articulated in Strickland. The state courts did not apply that standard and no further review of the Sixth Circuit's decision is warranted.

2. Question Presented No. 2: Did the Sixth Circuit err in granting the habeas writ on Respondent's ineffective assistance of counsel claim notwithstanding the state courts' contrary determination?

Here, Petitioner falls even farther from the type of question this Court seeks to review. Petitioner's complaint is simply that the Sixth Circuit's decision was incorrect because it is contrary to the decision of the state courts. The position advanced by Petitioner would make a federal court subservient to an incorrect determination of federal law by a state court. After the proper deference afforded to the state courts by the AEDPA, the Sixth Circuit determined that Respondent received ineffective assistance of counsel and that he was entitled to a new trial. This decision was made by correctly applying both Supreme Court and Sixth Circuit precedence and no further review is warranted.

STATEMENT OF FACTS

The facts are taken from the District Court's Opinion. Pet. App C-74a-101a. This is done for two reasons. First, contrary to Petitioner's suggestion, the District Court did rely on facts contained in the state court proceedings and cited to those proceedings frequently. Secondarily, the District Court's review and synthesis of facts from all state court proceedings provides a comprehensive overview of the facts. Additionally, Respondent asserts that the District Court was correct in its finding that: "[a] comprehensive review of the 800-plus pages of transcript in the record, in addition to the rest of the documents contained in the record, provides clear and convincing evidence that the facts as found in the Direct Appeal Opinion and Postconviction Hearing Findings . . . are inaccurate in numerous places." Pet. App C-74a. The District Court acknowledged the deference due under the AEDPA but determined that the "clear and convincing" evidence relieved him of that obligation. Id. The District Court's thorough discussion of the testimony, complete with citations to the record, was accurate and permissible based on the factual errors of the state courts.

A. The Alleged Attack

On July 23, 2000, A.L. and her father, S.L., a police officer with the City of Cleveland Police Department, went to their friends', Don and Becky Shaffer, home after the day together to get something to eat. However, when they arrived, it was late and Shaffer and Becky had retired for the night. Pet. App C-74a. Vasquez, his

wife Karra, and their two daughters lived in the Shaffer's basement as of that day. Pet. App C-75a. After eating, A.L. went down the 10-12 stairs to the basement. Id. Karra Vasquez and S.L. sat just outside by the screen door at the top of the stairs that lead into the basement. Id. A.L. remained in the basement with Respondent Vasquez and his daughters for about five minutes. Id. After A.L. and her dad had been at the Shaffer's house for a short time, S.L. called to his daughter from the top of the stairs to go home. Id.

B. Reporting the Attack

On August 4, 2000 A.L. and S.L. were again at the Shaffer's condo. Id. While there, A.L. told Don Shaffer that Vasquez had sexually assaulted her by "licking her private spot." Id. at 76a. Don Shaffer, S.L.'s best friend, told S.L. who then called his partner, Officer Tim Zbikowski. Id. The two talked about the allegations with A.L. Id. They called 911 and police and emergency personnel arrived. Id. A.L., S.L., Becky Shaffer and her infant son Aaron were taken to the hospital. No DNA evidence was found during the examination or during the subsequent investigation.

C. The Prosecution and Trial

1. Pre-Trial

Respondent Vasquez remained in custody from the time he was arrested. Id. at 77a. After his first appointed attorney withdrew due to a conflict, Vasquez's final trial counsel was appointed. He appeared at the first scheduled pretrial, on September 21, 2000, at which time he requested a continuance. Id. The court

continued the matter until October 12, 2000, for another pretrial. An additional pretrial was held on October 19, 2000. Trial counsel met with Respondent Vasquez on the last two pretrials for approximately 30 minutes total and again on the night before trial[1]. The case was tried on October 30, 2000. Id.

2. Trial

The case relied entirely on A.L.'s testimony about the attack and her father's testimony about her behavior. Other witnesses, including Don Shaffer, testified about what A.L. told them or what they learned while investigating the case. There was no D.N.A. or other physical evidence presented. Id. at 77-78a.

Trial counsel's cross-examination of A.L. "was limited in scope and duration, and arguably even more damaging than helpful to Vasquez's defense; at one point [he] asked [A.L.] if she kept a diary, to which [she] replied that she did. [A.L.] had not mentioned the diary in her direct examination, and the prosecutor had not offered it as an exhibit. [He] then asked whether [A.L.] had written about the alleged incident in her diary, to which [A.L.] again answered in the affirmative. He pressed on to ask whether [A.L.] had brought the diary to court that day, and A.L. answered no. [He] then concluded his questioning about [A.L.'s] diary by asking if she still had it, to which [A.L.] answered yes. [He] asked no other questions about

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[1] Trial counsel admitted that he took no notes of any of his meetings nor did he have two 10-page letters Respondent wrote to him. Pet. App. C-82a. He attempted to justify his failure to take notes or preserve copies of the letters by claiming that he had a good memory. ("So it is your practice that you don't take notes of your interviews with the client? No. I don't have to. Right. Because you have a pretty good memory? Right... I don't take notes. I just listen.") Post-Conviction Hearing Tr., pp.93-94, 103. This was disingenuous as his testimony, and loss of memory, in the Post-Conviction Hearing clearly demonstrates. Post-Conviction Hearing Tr., pp. 55, 90-91, 126, 128-130, 135-136, 348, 353; Original Trial Docket.

the diary, nor did he ever demand to see the diary after learning of its existence." Id. at 78a.

Trial counsel did not call a single witness. The case against Respondent was the then "ten-year-old victim, no physical evidence, a substantial delay in reporting the alleged incident, combined with the improbable circumstances of Vasquez assaulting [A.L.] while other adults (including a Cleveland Police Department officer and Vasquez's wife) were upstairs in a tiny home and two other young children were in the same room." Id. at 79a. Respondent was convicted and sentenced to life in prison.

D. Post-Conviction Hearing

On May 14-17, 2002, a post-conviction hearing was held.

1. Post-Conviction Hearing Testimony

[Trial counsel] testified that he was "pretty sure" he talked with Vasquez in a holding cell following a pretrial on September 14, 2000, though there was no pretrial that day according to the docket. He had no notes to verify this. He claimed he met with Respondent three times after two pretrials and on the night before trial. According to him, the first two meetings were a total of 30 minutes long. He also testified that his pretrial preparations included legal research on child rape cases, filing standard discovery requests, and having an informal meeting with the initial prosecutor. He also testified that he asked Respondent to sign a

speedy trial waiver twice. Respondent declined to sign it and [trial counsel] testified he was prepared to go to trial. Id. at 79-80a.

He also claimed that there were no helpful witnesses. He spoke to Joanne Kitchen[2], Respondent's mother-in-law, at Respondent's behest. Respondent gave him her name and phone number. Respondent told him that she could help him contact his wife. [Trial counsel] claimed that Kitchen told him no one would help. There were no notes to corroborate this conversation. Id. at 81a. After that, he made no attempt to talk with Respondent's wife Karra Vasquez. He also claimed that he assumed that Becky Shaffer would not be a helpful witness. Id. at 82a.

2. Karra Vasquez's Post-Conviction Hearing Testimony

Karra Vasquez emphatically detailed numerous attempts to contact her husband's first counsel as well as trial counsel. Those calls were never returned. She testified that she did not attend the trial or sentencing because she felt threatened by the social worker because she had been threatened with the removal of her children if she helped him. Id. at 83a.

Karra testified that she observed A.L. wearing a bathing suit on the night of the alleged attack. This contradicts A.L.'s testimony that Vasquez "pulled down my

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[2] The record is unclear exactly how and when trial counsel received Kitchen's name and phone number. Vasquez did not explicitly state in his post-conviction hearing testimony how or when he conveyed the information, although he testified that he gave his lawyer two ten-page handwritten letters containing information for trial counsel to investigate further. Trial counsel similarly testified that Respondent provided him with the information, but it is unclear whether the information was conveyed via the letters or orally. To further complicate matters, trial counsel testified that he received the information "when I think I went up in the jail," (Id. at 81a, n. 18) but the uncontested facts are that he only visited Vasquez at "the jail" on the night before trial, October 29, 2000.

pants and underwear" and that she "pulled my underwear and pants back up." S.L. testified at trial that A.L. told him that Vasquez "took her pants -- her shorts and her panties off" and that A.L. "pulled her clothes on." Second, Karra testified that A.L. went to the basement two times. The first time was for just a few minutes and, during the second time, Karra could hear them changing her daughter's diaper and getting the kids ready for bed. Then, A.L. left when her father called her. Id. at 83-85a.

Karra testified that her husband was in the basement with her children when A.L. and her father arrived and the Shaffers were in bed. A.L. had alternately testified that "just Don [Shaffer]" was awake when she and her father arrived at the condo, that she saw Respondent when she arrived because he was on the couch watching T.V. with his wife and that he asked her to go down to the basement with him. Id. at 86-87a.

Karra Vasquez also testified that she heard S.L. coaching A.L. and asking her specific questions while she was recounting the alleged attack, such as when and how the incident happened, and how long did it take. A.L. initially responded that the incident took two hours. S.L. replied that was too long and "you have to get this right. You have to make sure that you know exactly what you are going to say and repeat this to every person that asks you. You can't change your mind." Karra also heard A.L. asking "does this mean I get to be on TV? If I tell them this do I get to be on TV" and laughing and giggling. Id. at 88a.

3. Becky Shaffer's Post-Conviction Hearing Testimony

Becky Shaffer testified that she received a subpoena from the prosecution to testify at trial, that she was in the courthouse all three days of the trial, and that the prosecutor told her to leave the courthouse because they did not want Respondent's counsel to see her. Id. at 89a.

She testified that during the ride to the hospital, A.L. appeared excited by the attention she was receiving and asked if she was going to be on TV." Becky Shaffer also testified that on the night of July 23, 2000, she and her husband were in bed when A.L. and her father arrived. Becky Shaffer also testified that she took her son to the hospital with A.L. and her father because A.L.'s father and his partner told her to, not because she was concerned about Respondent. Finally, she verified that the social worker threatened to take Karra's children if she continued to try to help her husband. Id. at 89-92a.

4. Joanne Kitchen's Post-Conviction Hearing Testimony

Joanne Kitchen testified that she only told trial counsel that *she* could not help because she was not there. She denied saying that no one would help Respondent. But Ms. Kitchen was present when Karra was threatened by the social worker and Ms. Kitchen testified about her personal observations of A.L.'s attention seeking behavior. Id. at 92-95a.

5. Tammy Salopek and her daughter's Post-Conviction Hearing Testimony

Tammy Salopek also testified at the post-conviction hearing. Salopek was friends with the Shaffers and A.L. and her father. Salopek testified that A.L. and her sister would spend the night frequently. She did not know Respondent at all. Importantly, Salopek testified that her children were sexually molested and her daughter testified that she told A.L. about the details of the incident. Both Ms. Salopek and her daughter testified that A.L. is constantly seeking attention, is a "drama queen," and would overexaggerate. They both also testified that A.L. lied. Salopek stated: I wouldn't take anything that A.L. would come and tell me on A.L.'s word. Id. at 95-99a.

Salopek also testified about A.L.'s behavior in the days following her report of the alleged sexual abuse. Although she testified that A.L. stayed with her for four days after reporting, Salopek stated that A.L. had no trouble sleeping or eating and acted completely normally. This contradicts A.L.'s father's testimony at trial that his daughter was emotional and upset after telling him what happened. Id. at 97-98a.

6. Vasquez's Post-Conviction Hearing Testimony

Respondent testified that he only met with his trial counsel on three occasions for a total of 45 minutes. His testimony about the incident was that he was in the basement when A.L. arrived, that she came downstairs for 5 minutes and then left. Id. at 100-101a.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents in Determining That the State Courts' Rulings Were Contrary to Federal Law.

Petitioner argues that the Sixth Circuit failed to apply the proper Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") deference to the state court opinions. Alleging the Sixth Circuit ignored this Court's holding in Woodford v. Visciotti, 537 U.S. 19 (2002) and Holland v. Jackson, 542 U.S. 649 (2004), Petitioner asks whether referencing the Strickland standard for ineffective assistance of counsel using "imprecise shorthand" results in a decision that is "contrary to" federal law. This demonstrates a clear misstatement and misunderstanding of the legal underpinnings of the Sixth Circuit's opinion in the instant case. It was not the misstatement of the legal standard that led to *de novo* review. It was the clear *application* of the incorrect standard that guided the Sixth Circuit's conclusion that the state court opinions were contrary to federal law.

The Sixth Circuit's opinion, written by Circuit Judge Boggs, held that the state courts increased the burden of persuasion necessary to sustain an ineffective assistance of counsel claim pursuant to Strickland. Pet. App B-4a. The Court correctly noted that Strickland requires a petitioner to demonstrate that there is a "reasonable probability" of a different outcome but for the inadequacy of his counsel. Id. at 10 (citing Strickland, 466 U.S. at 694). The majority noted, however, that the Ohio trial court and the Ohio appellate court elevated this already difficult burden

by applying the standard of whether the trial outcome "*would* have been different" but for the mistakes of counsel. Id. at 15a.

Deference is not required when the state court decision is "contrary to" federal law.

> The maxim that federal courts should 'give great weight to the considered conclusions of a coequal state judiciary' . . . does not mean that we have held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.
> Wright v. West, 505 U.S. 277, 305 (1992) (opinion concurring in judgment). See also, Panetti v. Quarterman, 551 U.S. 930, 954 (2007) (When a state court's adjudication of a claim is "dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."); Early v. Packer, 537 U.S. 3, 8 (2002) (indicating that § 2254 does not preclude relief if either "the reasoning [or] the result of the state-court decision contradicts [our cases]").

The Sixth Circuit did not simply find a fleeting shorthand reference to an incorrect standard. Instead, the Sixth Circuit explicitly noted that "[t]his was not a slip of the pen during a rote repetition of a rule corrected upon application of law to fact." Pet. App B-15a. The Court found that, although the trial court correctly cited Strickland, when discussing its second prong, the trial court (and subsequently the appellate court) "stated that prejudice occurs only when '[the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation.'" Id. (emphasis in original). The Sixth Circuit went on to note that the trial court repeated itself, "explaining that '[i]n order to demonstrate a

claim of trial counsel's ineffectiveness according to the United States Supreme Court, a postconviction petitioner is required to demonstrate that (1) the performance of defense counsel was seriously flawed . . . and (2) the result of petitioner's trial or legal proceeding *would have been different* had defense counsel provided proper representation.'" Id. at 15a (emphasis added). The state court again and again relied on its incorrect version of the second prong of the ineffectiveness standard: "'perhaps most importantly, not one of the witnesses who testified [at the post conviction hearing] . . . offered any testimony that could have changed the outcome of defendant's trial'"... "'even if the Court found that Butler's question demonstrated a deficiency . . . defendant has shown no resulting prejudice. As demonstrated above, neither the testimony of Mrs. Vasquez or Becky Shaffer would not [*sic*] have changed the outcome of the trial.'" Id. It was upon the state court's application, not a simple misstatement, of the incorrect standard that the Sixth Circuit determined that the state court decision was contrary to well established Supreme Court precedence.

Circuit Judge Boggs painstakingly explains that it is the *changing of*, not merely the shorthand reference to, the standard that is the basis of the Court's opinion that both state courts applied the wrong standard:

> In analyzing Vasquez's claim as to the failure to interview and call potential defense witnesses, the court relied directly on its version of the ineffectiveness standard as crucial to its decision against relief: "perhaps most importantly, not one of the witnesses who testified [at the post conviction hearing] . . . offered any testimony that could have changed the outcome of defendant's trial." The court repeated, in the context of a different claim of ineffectiveness, that "even if the Court found that Butler's question demonstrated a deficiency . . . defendant

> has shown no resulting prejudice. As demonstrated above, neither the testimony of Mrs. Vasquez or Becky Shaffer would not [*sic*] have changed the outcome of the trial."
> The Ohio Court of Appeals, reviewing for abuse of discretion, repeated the error. It framed its rejection of Vasquez's appeal in terms of a changed-outcome: "defendant presented numerous witnesses who did not testify at his trial. Their absence . . . does not demonstrate his counsel was ineffective and that the outcome of his trial *would have been different* had they been witnesses . . . ." (emphasis added). In analyzing the argument, the appeals court expressly adopted the trial court's reasoning: "[w]e agree with the trial court's conclusion that 'not one of the witnesses who testified . . . offered any testimony that could have changed the outcome of defendant's trial.'"
> This is not a casual error.
> Pet. App B-15-17a.

It is only through the twisting of the opinion below that Petitioner can claim that the question before this Court is whether a federal court should uphold a state court decision when it initially cites the correct standard and later uses "shorthand in referring to it, even if the shorthand is imprecise." Petition at 11. This statement completely trivializes and virtually ignores the foundation of the Sixth Circuit's opinion. In fact, the Sixth Circuit specifically noted that when a situation exists as Petitioner claims is here, this Court has found the state court decision not contrary to clearly established federal law. Pet. App B-18a. The Sixth Circuit's opinion expressly cited Holland v. Jackson, 542 U.S. 649, 654-55 (2004) for its holding that the "use of the unadorned word 'probably' is permissible shorthand when the complete Strickland standard is elsewhere recited." It also cited Woodford v. Visciotti, 537 U.S. 19, 23 (2002) for the proposition that an innocuous shorthand is permissibility when describing the Strickland standard. Pet. App B-18-19a.

Petitioner primarily rests its request for *certiorari* on the assertion that this case is remarkably similar to Jackson and Visciotti. While Petitioner correctly states that the cases stand for the proposition that using an ephemeral shorthand reference to Strickland is permissible, that holding is inapplicable here and those cases are unmistakably distinguishable from the instant one. The Sixth Circuit's opinion plainly distinguished itself from the "shorthand" cases of Jackson and Visciotti and properly placed itself under the controlling Supreme Court precedent of Williams v. Taylor, 529 U.S. 362 (2001), to find that both the Ohio trial court and the Ohio appellate court applied a standard contrary to clearly established federal law. Pet. App B-19a.

In Jackson, this Court reversed the Sixth Circuit's holding that the state court applied the wrong burden of proof under Strickland. Jackson, 542 U.S. at 655. These three statements the Sixth Circuit found objectionable were: (1) in a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence; (2) it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified; and (3) Petitioner failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors. Id. at 654-655. The first statement was "reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions..." Id. at 654. The second statement was not seen as implying "any particular standard of probability."

Id. Finally, use of the "unadorned word 'probably' is permissible shorthand when the complete Strickland standard is elsewhere recited." Id. at 655.

In both Jackson and Visciotti, the Supreme Court examined opinions where the state court first articulated the correct Strickland standard, but proceeded to leave out the "reasonable" modifier in subsequent references to the standard. In Visciotti, the Ninth District Court of Appeals held that the state court used a higher standard of proof because the state court opinion used the term "probable" without the modifier "reasonably" in four places. Visciotti, 537 U.S. at 23. As noted above, the use of the "unadorned word" probably is permissible shorthand. Id. at 24. In Visciotti, the Court discusses the Strickland test's terms and the use of shorthand:

> [The state court's] occasional shorthand reference to that standard by use of the term "*probable*" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision.

537 U.S. at 23-24 (emphasis added).

Yet, in the case at bar, the state courts did not just exclude a simple modifier. The state courts used no modifier whatsoever. The vital term of "probability" was stricken from its Strickland analysis, making it clear that an impermissibly higher standard was applied. The standard was clearly changed to an absolute. It is apparent that this Court finds the term "probable" (or some analogous variant thereof) to be absolutely essential to the Strickland standard. The lack of the "reasonable" modifier is considered "imprecise" but acceptable because it does not connote a different standard. However, the language in the Ohio state courts in

Respondent's post-conviction adjudication indicates that a different standard was applied.

The removal of the term "probability" from the Strickland test, leaving "would have been different," changes the test's burden of proof entirely. Under the Strickland standard, "reasonable probability" is a burden less than "more likely than not." Strickland, 466 U.S. at 693. In other words, the Supreme Court made it clear that conduct that has fifty percent or less chance of affecting the outcome of a trial may still satisfy the "reasonable probability" burden of Strickland. In stark contrast, herein, the state trial and appellate courts' application of the "would have been different" standard applies a burden of positive certainty - "that competent counsel actually would have resulted in [Petitioner's] acquittal;" a much higher burden than, and entirely contrary to, the standard set forth in Strickland. Pet. App B-17a.

Further, Petitioner analogizes to the present case this Court's conclusion that the shorthand was occasional in Jackson. Here, it was not occasional. In fact, this case represents nearly the opposite of Jackson and Visciotti. The only thing occasional or fleeting in Respondent's state court adjudication was the correct standard. As noted by the Sixth Circuit, there was only one correct cite and many erroneous ones. The erroneous references to the Strickland standard here were used when the courts were applying the analysis, not when introducing or setting the stage for the analysis.

Petitioner also discusses several circuit court cases in what seems to be an attempt to create a split in the circuits, although it also cites one in the Sixth Circuit. According to Petitioner, these cases show "little difficulty following Visciotti and Jackson." Petition at 14-15. Petitioner is correct that Visciotti and Jackson govern the cases it discusses. Respondent's case, however, is not such a case. This case involves an *application* of an incorrect standard and its holding is guided by this Court's decision in Williams, 529 U.S. 362. There, as here, the standard was not merely referenced improperly. It was applied that way.

The Sixth Circuit meticulously explained that the standard invoked in the state court was not merely a shortened, if imprecise, reference. It was not departing from any precedents, as suggested by Petitioner. Petition at 15. "This is not a casual error. A 'reasonable probability' of difference does not mean 'would have been different.' The latter formulation puts a greater burden on the petitioner. To prevail on his claim as it was adjudicated, Vasquez was required not only to show that his counsel's deficiency 'undermine[d] confidence in the outcome,' but to prove that a trial with competent counsel actually would have resulted in his acquittal." Pet. App B-17a.

In fact, as noted by the Sixth Circuit, this Court used an example strikingly similar to the instant case when interpreting what Congress meant by "contrary to" in § 2254(d). Id. at 111.

> If a state court were to reject a prisoner's claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding *would* have been different, that decision would be "diametrically

> different," "opposite in character or nature," and "mutually opposed" to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a "reasonable probability that . . . the result of the proceeding would have been different."

Williams, 529 U.S. at 405-06 (2001) (citing Strickland, 466 U.S. at 694).

That is why this case is far more similar to Williams than Visciotti or Jackson. In Williams, this Court reversed the Fourth Circuit Court of Appeals because it *applied* the wrong standard. "[The Court of Appeals] construed §2254(d)(1) as prohibiting the grant of habeas corpus relief unless the state court 'decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.'" Williams, 529 U.S. at 374. As in Williams, the state courts here changed the analysis; they changed the standard.

Only once does Petitioner attempt to scrutinize what the state courts did. "In assessing the prejudice, the court observed that 'none of the defendant's witnesses offered any testimony to support defendant's theory of innocence,' and '[n]one of their testimony challenges the victim's account of the events leading to defendant's convictions.'" Petition at 16. This statement, according to Petitioner, demonstrates that the state court used the correct standard. In point of fact, the only thing these statements demonstrate are a complete disregard for the realities of this and most child abuse cases. As correctly noted by the Sixth Circuit, there would be no direct witnesses to the alleged crime beyond the perpetrator and the victim. Pet. App B-25a. Therefore, there would be no witness to testify to innocence or to contradict

the alleged victim's account of the events. "The circumstances ordinarily surrounding an accusation of child sexual abuse underscore this concern for developing impeachment evidence." Id.

Contrary to the suggestion of Petitioner, the Sixth Circuit approached §2254(d) precisely as directed by this Court in Williams. The Court of Appeals first asked if the state court decision "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 USC § 2254(d). Consistent with Williams, it found that the state court decision was contrary to clearly established Supreme Court precedent, Strickland. "[T]herefore the Court of Appeals was "unconstrained by *§ 2254(d)(1)* . . . and de novo review [was] appropriate." Pet. App B-19a.

Petitioner concludes its arguments regarding this Question Presented by claiming that the Sixth Circuit only held that the state courts' opinions were "contrary to" federal law on the second prong of Strickland. Petition at 16-17. Again, Petitioner mischaracterizes the Sixth Circuit's opinion. The Sixth Circuit did determine that *de novo* review was proper because of the failure to adhere to Strickland in the second prong of its test for ineffective assistance of counsel. However, when looking at trial counsel's performance, the Sixth Circuit clearly determined that it fell below any constitutionally permissive standard. The Sixth Circuit did so with considerable deference to the state courts' findings. In fact, the Sixth Circuit refused to consider both Petitioner's ex-wife's and ex-mother-in-law's

testimony because the findings by the state court relative to Mrs. Vasquez and Mrs. Kitchen were entitled to deference under the AEDPA. The Sixth Circuit employed the proper AEDPA deference and found trial counsel's performance impermissibly deficient. Pet. App B-32a.

If this Court were to accept Petitioner's contention, it would follow that as long as there is a recitation to a correct standard, it does not matter what the state court actually does or how it applies the standard. This will easily and quickly transfer from an ineffective assistance of counsel analysis to other areas of the law. It would not be an unreasonable stretch to say that as long as a state court correctly stated that the prosecution had the burden of proving guilt beyond a reasonable doubt, federal courts could not interfere if the state court then went on to actually apply a preponderance of the evidence standard in assessing the sufficiency or weight of the evidence. Such a result would leave the federal court in the secondary role of merely looking for the recitation of certain words and leaving any analysis of federal law to the state courts.

This flawed interpretation of federal law appears to be exactly what Petitioner is urging. "[H]aving shown that it was aware of the correct law, the court did not need continually to incant magic words to receive deference." Petition at 16. Petitioner's proposal that a state court opinion is entitled to deference regardless of the analysis as long as it initially correctly recites the legal principle on a single occasion is clearly contrary to federal law. As this Court noted in Williams, Congress did not intend that "federal courts actually defer to a state-court

application of the federal law that is, in the independent judgment of the federal court, in error." Williams, 529 U.S at 387.

B. The Sixth Circuit Decision Properly Applied Both AEDPA Standards and this Court's Precedents in Determining That Respondent Received Ineffective Assistance of Counsel.

Petitioner next asserts that the Sixth Circuit's conclusion that Respondent received ineffective assistance of counsel was mistaken based on the specific facts of this case. Petition at 18. However, this Question Presented does not comport with this Court's rules guiding what types of cases are traditionally subjection to acceptance. Rule 10 of the Rules of this Court establishes that *certiorari* jurisdiction is designed to serve broad purposes. It is not for correcting the error in particular cases. Rule 10 explains:

> Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
> A petition for a writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Petitioner's second Question Presented seems to fall into just the type of category that this Court seeks to avoid when granting *certiorari*.

Again protesting the refusal to give AEDPA deference (the "decision to grant Vasquez habeas relief hinged entirely on its ability to wriggle free of the constraints of the AEDPA" (Petition at 18)), Petitioner asserts that Respondent Vasquez's trial counsel met the constitutional requirements of effective assistance of counsel. However, as correctly determined by both the District Court[3] and the Court of Appeals, trial counsel fell far below the constitutionally sufficient bar and provided ineffective assistance of counsel as he did no preparation or investigation before Respondent's trial on charges that could, and did, result in a life sentence.

First, as noted by the Sixth Circuit, it is essential that this inquiry is undertaken with an understanding of the type of case at issue here. Respondent was accused of the sexual abuse of a minor. It is undisputed that there are no witnesses to the alleged abuse. Pet. App B-25a. This is frequently the fact in these type of cases. Outside of the defendant testifying, there can be no direct evidence of innocence, only circumstantial. Here, as in other cases involving sexual abuse of a minor, the evidence that trial counsel failed to uncover and present at trial relates to impeachment of the complaining witness and those offering circumstantial evidence of Respondent's guilt. That the missing evidence alleged is impeachment evidence and not direct evidence of innocence does not affect the principles of Strickland or the basic components of effective assistance of counsel. As observed

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[3] The Sixth Circuit disagreed with the District Court's rationale for engaging in *de novo* review.

by the Sixth Circuit, "this is because we are assessing the reasonableness of the representation and the defenses available to the attorney change what is reasonable: where there are no direct witnesses to the alleged crime beyond the perpetrator and the victim, impeachment evidence is at a premium." Pet. App B-25a.

In some respects, Petitioner continues to argue the first question presented because it claims that the state court determination of facts should be given more deference. However, if this Court finds that the Court of Appeals correctly determined that the state court acted contrary to Federal law, the District Court and the Court of Appeals were free to review the facts de novo. The Federal Courts' determination that Respondent received ineffective assistance of counsel is more than supported by the evidence.

Moreover, the Sixth Circuit specifically rejected the District Court's wholesale review of the factual determinations of the state courts. As correctly stated by the Sixth Circuit, the "AEDPA also supplies our standard for reviewing a factual record. The statute provides that 'a determination of a factual issue made by a State court shall be presumed to be correct.' *28 U.S.C. § 2254(e)(1).* Only if Vasquez 'rebut[s] the presumption of correctness by clear and convincing evidence' may we disregard those determinations. The district court held that this burden was carried." Pet. App B-19a. The District Court stated: "Nevertheless, the Court finds that Vasquez has met his burden. Sadly, in this case his appointed counsel did

almost nothing before or during trial, in a situation where the prosecution's case was weak and Vasquez faced life imprisonment." Pet. App C-106a.

The Court of Appeals rejected the District Court's thorough and detailed *de novo* review of the facts as incorrectly determining that it was able to avoid the AEDPA deference to findings of fact. Pet. App B-21a. The Sixth Circuit specifically rejected the District Court's refusal to defer to the state court's findings that Joanne Kitchen and Mrs. Vasquez would have been helpful witnesses and that trial counsel's failure to contact Mrs. Vasquez was inexcusable. Id. at B-23a. Instead, the two part test of Strickland was undertaken with just the trial counsel's failure to contact other witnesses and failure to recognize and use the EMS run sheet as the vital evidence that it is.[4] Id.

Petitioner correctly notes that it is the testimony of three potential witnesses and the EMS run sheet that ultimately establish that the Strickland standard was met. However, the inquiry of the Strickland test is broader than that.

> A counsel's performance is a deprivation of a defendant's *Sixth Amendment* right to counsel where a defendant shows his counsel's assistance was both deficient and that the deficiency prejudiced the defendant. A performance is deficient only if it 'fell below an objective standard of reasonableness' in light of the 'prevailing professional norms.' And a deficient performance is prejudicial if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable

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[4] "To reiterate, on the facts as we must take them, based on the implications of the state court's decision and the operation of AEDPA deference, Vasquez cannot base his ineffective assistance of counsel argument on the failure to investigate Karra Vasquez or Joanne Kitchen. They refused to cooperate and any amount of investigation by Butler would not have made a difference. But Vasquez may base his claim on the failure to investigate and put in the record the EMS run sheet and Becky Shaffer's account of A.L.'s credibility. By extension, Vasquez may also rely on the testimony of Salopek and Snyder, who (by admission of the trial court) likely would have been found through an interview with Shaffer, in making his claim." Pet. App B-23a.

> probability is a probability sufficient to undermine confidence in the outcome.
> Strickland, 466 U.S. at 687-88, 694 (internal cites omitted.)

Approaching the first prong of the test, the appropriate question is whether trial counsel's assistance "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. Instead of ignoring the "healthy amount of deference to counsel's tactical and litigation decisions," as suggested by Petitioner, the Sixth Circuit detailed the deference to be given. "... counsel's tactical and litigation decisions...are 'virtually unchallengeable' in the ordinary case." Pet. App B-24a. (quoting Strickland, 466 at 690). The most important aspect of this inquiry, that Petitioner has over looked, is precisely the one at issue here. As maintained by the Sixth Circuit:

> But this deference to strategic choices has always been tempered by a requirement that the choices themselves be informed: 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' Accordingly, 'a particular decision not to investigate must be directly assessed for reasonableness.' Our circuit has expressed this principle with more color: 'the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the 'strategic' choice erected upon it rest on a rotten foundation.'
> Pet. App. B-24a (quoting Strickland, 466 U.S. at 691 and Ramonez v. Berghuis, 490 F.3d 482, 488 (6th Cir. 2007).

It was this area of inquiry that reasonably led the Sixth Circuit to conclude that trial counsel was constitutionally ineffective.

Focusing on trial counsel's duty to investigate and prepare for the case, the Sixth Circuit pointed out that there is not a definitive statement of what a "reasonable investigation" entails. Pet. App B-24-25a. "But well established

principles suggest that the claim that his attorney failed to identify key evidence and failed to locate and interview critical witnesses is within the known contours of the duty." Id. at 24a. Again, the fact that the key pieces of evidence and critical witnesses[5] would not go to the heart of the innocence question but instead to challenge the victim's credibility does not change the present analysis considering the type of case for which Respondent has been convicted.

The question becomes: were trial counsel's efforts at investigating and preparing for Respondent's trial reasonable? The Sixth Circuit and the District Court unequivocally answer the question in the negative:

> Indeed, viewing the situation (as we must) "from counsel's perspective at the time," *Strickland, 466 U.S. at 689*, four facts were clear and should have pointed him toward the investigation necessary to put on a stronger defense. First, A.L.'s story was never crystal clear, suggesting that perhaps a well-informed cross-examination and a contradicting defense witness could have raised a reasonable doubt as to its veracity. Second, all of the people involved in the crime and its revelation were extremely interrelated, suggesting that there is a convoluted back-story that could have provided context for the jurors to understand the accusation and resolve testimonial inconsistencies. Third, Becky Shaffer was the sister-in-law of Vasquez, at the place of the attack on the night it occurred, and with A.L. immediately her accusation, all suggesting that she may have had information useful to

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[5] Petitioner and the state courts lay the blame for the failure to contact witnesses squarely at Respondent's feet. However, the Sixth Circuit appropriately found that the cases do not support "the proposition that a defendant gets only the defense that he is capable of providing personally. (They hold only that it is not unreasonable for an attorney to limit investigation once her client has frustrated her otherwise reasonable efforts. *See, e.g., Lorraine v. Coyle, 291 F.3d 416, 435 (6th Cir. 2002)).* The *Sixth Amendment* guarantees minimally effective representation because the adversarial testing of the state's case, a cornerstone of our criminal justice system, is very difficult without counsel. *See Kimmelman v. Morrison, 477 U.S. 365, 384, (1986)* ('In making the competency determination, the court should keep in mind that counsel's function . . . is to make the adversarial testing process work . . . .') (internal quotation marks omitted). An attorney (especially an experienced one like [trial cousel] has skills and knowledge beyond the ken of an average criminal defendant. He should be expected to take a sober account of the case he is presented with and proceed to put together the best challenge to the prosecution's proof. This is true even if he must use information gleaned from discovery and investigation instead of the defendant's mouth." Pet. App B-26a, n. 2.

> the first two facts. Fourth, he had discovery materials from the state that, among other things, contained the EMS report and the names and contact information of the people the police investigated, including Becky Shaffer.
> Pet. App B-27a.

Against this backdrop, the Sixth Circuit determined that the failure to investigate, not the failure to utilize or call anyone as witnesses, was unreasonable. Id. The Court also went on to explain that the "prosecution's case affects our judgment regarding an attorney's decisions against investigation." Id. (citing Brown v. Smith, 551 F.3d 424 (6th Cir. 2008).) In the instant case, trial counsel knew that "Becky Shaffer was ideally situated to provide information on the only avenue of defense available to Vasquez and that the EMS report contained information contradicting the version of events that the state was alleging at trial. He was therefore deficient by declining to pursue these leads." Id. at 28a. It was purely unreasonable "to interview no potential witnesses and develop no defense." Id.

The Sixth Circuit then individually reviewed each witness and piece of evidence that it found relevant and carefully explained why the Ohio courts were incorrect. First, unlike Petitioner and the state courts, the Sixth Circuit wisely found that Mrs. Kitchen's alleged statement to trial counsel, which she denies making, that family members were unwilling to help should not have discouraged trial counsel from contacting Mrs. Becky Shaffer. "[I]t is incredible for [trial counsel] to base a decision against interviewing her on a single statement from the witness's mother." Pet. App B-29a. This is especially true since it was not necessary to go through her mother to contact her as it was with Respondent's ex-wife. Id.

The Court went on to state that the fact that Mrs. Shaffer was married to a state's witness may explain a reason to not call her to the stand, "but not why he did *not attempt to talk with her* in the first instance. *Cf. Brown, 551 F.3d at 432* ("[O]ur quarrel is not with trial counsels' decision to forgo calling . . . a witness *per se,* but rather with the lack of any reasonable, timely investigation into what she might have offered the defense.")." Id. Moreover, trial counsel knew that she "was likely to have relevant information and talking with her could help develop an otherwise non-existent defense." Id. Unlike the mischaracterization that all family members refused to cooperate, trial counsel did not reach this conclusion after any reasonable investigation. Undisputedly, he had one conversation with Mrs. Kitchen during which she allegedly stated that family may not want to cooperate. Trial counsel made no attempt to contact anyone else or determine if that statement was based in truth. Just as a non-cooperative defendant does not extinguish counsel's obligation to investigate, neither does a single uncooperative witness.

Another devastating failure on the part of trial counsel, as determined by the Sixth Circuit, is the inexplicable disregard for the EMS run sheet. This, the Sixth Circuit claims, should have been even more obvious than the necessary investigation that trial counsel failed to conduct. Pet. App B-29-31a. The EMS report contained information demonstrating inconsistencies in the victim's story: "she described the attack then as 'he put it in me' and not as Vasquez licking her vagina [as she did at trial], and she claimed that she had taken a shower on the

night of the attack (which contradicts her father's testimony that she fell asleep on the couch with her father)." Id. at 30a.

Petitioner argues that the state court statement that there was no contradiction between the EMS report and the testimony because the "it" referred to in the run sheet could have been Petitioner's tongue and that she could have showered after her father went to sleep. "This post hoc harmonization is not impossible as a matter of logic but does not explain [trial counsel's] indifference to the potential inconsistency (the disharmonious explanation is probably more plausible)." Pet. App B-30a. "He did not try to *find out* whether or not the testimony of [the victim] and her father would stand up to impeachment on the basis of the EMS report. Moreover, [trial counsel] should have identified the report as particularly probative because it was made so close to the original report of the attack, so its inconsistency would sharply undercut the corroborative testimony based on interviews with A.L. that took place much later." Id. Penetration and licking are much different and this important inconsistency should have been "recognized as premium impeachment evidence." Pet. App B-30a. The Sixth Circuit also claimed that the run sheet should have led to trial counsel's interviewing the EMS responders. Id. "They have been in a position to testify as to A.L.'s demeanor in the ambulance on the way to her exam, possibly corroborating Becky Shaffer's testimony that A.L. was at ease in the ambulance and more concerned with the attention she was receiving than disturbed by the abuse she reported." Id.

Dismissing the contention that the failure to do any investigating was trial strategy, the Sixth Circuit stated that "that decision was 'objectively unreasonable because it was a decision made without undertaking a full investigation' and therefore not due deference. Parrish Towns v. Smith, 395 F.3d 251, 259 (6th Cir. 2005) (internal quotations omitted); see also Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1990) ('Where counsel fails to investigate and interview promising witnesses, and therefore has no reason to believe they would not be valuable in securing defendant's release, counsel's inaction constitutes negligence, not trial strategy.')" Pet. App B-31a. In fact, the only pretrial work offered by trial counsel was some minimal legal research on these types of cases in general. Id. This

> should have pointed him toward the investigation he failed to undertake. It is well known in the literature (and the cases cited above) that the credibility of the child witness is often central to the success of child sex abuse prosecutions and that the circumstances surrounding the initial accusation of the abuse are important indicia of credibility. This suggests that, even without knowing what [trial counsel] knew about the available evidence, Becky Shaffer and the EMS run-sheet would be natural starting points to an investigation and a defense. Yet, Vasquez's attorney did not pursue these leads. We do not believe that this behavior can accurately be described as a "strategic choice". Instead, we hold it to be representation "below an objective standard of reasonableness" and constitutionally deficient."' Pet. App B-31-32a.

Finally, Petitioner seeks to blame, once again, the wholesale failure to investigate or prepare for trial on Respondent. Petition, pp. 23-24. Although this was not addressed by the Sixth Circuit, the failure of Respondent to waive a constitutionally protected right (the right to a speedy trial), especially in the face of being wholly uncertain about his trial counsel with whom he met on three occasions

for a total of 45 minutes, does not excuse trial counsel's failure to prepare for trial in any manner whatsoever.

The Sixth Circuit's final step was to examine whether this deficient performance resulted in prejudice to Respondent. As did the District Court, the Sixth Circuit determined that it did. "[I]n light of centrality of credibility to the prosecution's case and the strength of the missing impeachment evidence[6], Vasquez has demonstrated that but for his counsel's unprofessional errors there was a reasonable probability that his trial would have had a different outcome; our confidence in the verdict is indeed undermined." Pet. App B-37-38a.

Regarding the EMS run sheet, it "demonstrates a specific and non-trivial difference in her story over how the attack took place: the run-sheet implies [she] reported that there was penetration by Vasquez's penis in contradiction to the evidence at trial." Pet. App B-32a. This is a substantially prejudicial error and cannot be discounted by Petitioner's claim that the tongue was it. Petition at 26. The Sixth Circuit specifically addressed this concern:

> Coupled with the inconsistency about the shower, we think it likely a jury would consider the run-sheet evidence of instability in A.L.'s story. This is especially so because it is unlikely that the jury would believe a nine-year-old would colloquially describe Vasquez's licking as "put[ting] it in," whereas she might be likely to use that term for penetration. Moreover, unlike A.L.'s story at trial, penetration is not consistent with the circumstances of the attack occurring in a short

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[6] "In determining whether Vasquez has carried his burden, we must evaluate the deficiency in light of the 'totality of the evidence before the . . . jury.' And so, in a case in which the 'verdict or conclusion [is] only weakly supported by the record is more likely to have been affected by errors . . .' Accordingly, in cases like this one, where the only evidence of the crime or the defendant's guilt is the testimony of the victim, our circuit has been especially willing to find prejudice from deficient representation because '[t]he lack of physical evidence confirming sexual activity meant that this was necessarily a close case at the trial level.'" Pet. App B-32a. (internal cites omitted)

> window of time, with her father's presence upstairs, and on the same bunk-bed where Vasquez's children were sleeping.
> Pet. App B-32-33a, n. 3.

The other failure left to address in terms of prejudice is Becky Shaffer. Mrs. Shaffer testified at the post-conviction hearing. The Sixth Circuit accurately determined that she would have revealed essential inconsistencies in the victim's alleged timeline. Pet. App B-33a. Further, Mrs. Shaffer witnesses the victim's father (a police detective) coaching his daughter and prompting her replies to law enforcement. Pet. App B-30a. She further would have challenged the assertion by Petitioner that the victim was traumatized and not herself. Mrs. Shaffer witnessed the victim acting relaxed and excited about attention and the possibility of being on TV. Id. Of course, this is not indicative of a young girl who recently finally revealed a traumatic experience. Pet. App B-33-34a.

Equally as important, speaking to Mrs. Shaffer would have, as it often does, led Respondent's trial counsel to speak to other potential defense witnesses. Pet. App B-33a. The testimony of Tammy Salopek and her daughter, Ashley Snyder at the post-conviction hearing could have been essential to an acquittal for Respondent. Mrs. Salopek was friends with both the Shaffers and the victim's family. Id. at 10a. She and her daughter were in continuous contact with the victim both before and after the event. Id. "They indicated they would have testified to [the victim's] lack of truthfulness -- specifically her willingness to lie to get attention." Id. Further, the victim's father testified that his daughter was devastated and not herself after she revealed the abuse. Mrs. Salopek and her

daughter would have testified that in the week immediately after the accusation, there was no change in the victim's behavior, even though they had ample opportunity to observe her since she slept at their house that week. Id. Finally, the two could have bolstered Respondent's attempt to discredit the victim and argue that she concocted the story. During the summer of 2000, Ashley Snyder had actually been the victim of sexual molestation and told the victim about it. Id. This testimony, that the victim is not trustworthy and does not understand the consequences of lies, was not acting strange after she revealed the abuse, and had just recently heard of the sexual abuse suffered by Snyder, "challenges the specifics of [the victim's] story, her motivations, and her general truthfulness." Pet. App B-33a. It also "undermines the corroboration evidence presented by the state – that [the victim's] story did not change in her retelling of it, that she acted out of character after the attack, and the implausibility of a nine-year old making up such a sexual-molestation story." Pet. App B-33-34a.

Petitioner argues that it was safe to assume that Mrs. Shaffer would not have been cooperative because of the conversation with Mrs. Kitchen and because Mrs. Shaffer did not want to make a written statement to the police, even though she had already made a verbal one. These facts are completely irrelevant to the duty trial counsel owed to at least investigate her, speak to her. As noted above, the fact that her husband was a state witness or that her mother said the family may not be willing to help tells trial counsel nothing about her willingness to cooperate to help the husband of her sister. Further, her desire to refrain from making a written

statement is also immaterial because, in addition to the fact that she actually spoke to the police, she also may have responded differently to certain, direct questions asked by trial counsel with a different agenda and perspective than the police. There is just no evidence to support these assertions. Her testimony at the post-conviction hearing would undoubtedly have had an effect on the jury.

With regard to Mrs. Salopek and her daughter, Petitioner only argues that the evidence regarding the daughter's previous molestation was inadmissible in the post-conviction hearing because Respondent failed to provide a proper foundation. The Sixth Circuit failed to address this fact. Petitioner argues that this evidence should not have been considered by the Sixth Circuit because of the trial court's determination that it could not consider it. Petition at 20. The Sixth Circuit, however, was free to consider it because it had already found the trial court's factual determination regarding this evidence f awed.

Moreover, the Sixth Circuit found that the evidence at issue was not cumulative as to the narrow admissions trial counsel was able to elicit at trial. Without any factual basis for cross-examining, he was only able to draw out that the victim had some issues with telling the truth, just as every kid did. The evidence presented at the post-conviction hearing went far beyond this innocent generality and provided concrete and compelling evidence that the victim was fabricating the story. "The evidence provides direct and specific challenges to her motivations (she wants to be on TV, she wants attention), her trustworthiness (she lies a lot and her friends and friends' parents confirm that she does not understand

consequences of her lies), the stability of her story (the change in the EMS report, the prompting from her father), and the origins of her story (she just recently learned Ashley Snyder had been molested), each of which was not presented to the jury via Butler's cross-examinations." Pet. App B-36a. The missing evidence "undermine[s] confidence in the outcome." Strickland, 466 U.S. at 6.

Conclusion

For the above stated reasons, Respondent Vasquez requests the Court deny Petitioner Warden's Petition for *Certiorari*. The Warden's Ppetition misrepresents the scope and analysis of the Sixth Circuit's decisions and opinions, as well as the facts of the underlying case. The Sixth Circuit's decisions create no conflict of law, will in no way create any sort of confusion in this Court's jurisprudence, nor does Petitioner provide any other reason to warrant revisiting these well and clearly-established areas of the law.

Therefore, Petitioner Warden's Petition should be denied.

Respectfully submitted,

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